Supreme Court, U.S.
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No. 95-525

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

TURECAMO OF SAVANNAH, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether, given the fact that Congress in enacting the *Maritime Commercial Instruments and Liens Act* (MCILA), 46 U.S.C. § 31301, *et seq.* did not intend to change the substantive law governing a party's right to bring an *in personam* action based on *in rem* principles against the United States and, given the fact that there is only one Circuit Court opinion on the limited issue raised by Petitioner, this Court should not grant the Petition for Writ of Certiorari.

LIST OF PARTIES PURSUANT TO RULE 29.1

The United States was the Appellant in the proceeding below and Respondent Turecamo of Savannah, Inc. was the Appellee.

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UNITED STATES OF AMERICA,

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TURECAMO OF SAVANNAH, INC.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Turecamo of Savannah, Inc. brought this action against Petitioner, United States of America pursuant to the *Maritime Commercial Instruments and Lien Act,* 46 U.S.C. § 31341. Respondent, a towing company, alleged that it had provided necessaries to the United States vessel, YFNB-33 SEACON. Based on the Eleventh Circuit's decision in *Bonanni Ship Supply, Inc. v. United States,* 959 F.2d 1558 (11th Cir. 1992),

Respondent filed a Motion for Summary Judgment on April 27, 1993. The lower court granted Respondent's Motion for Summary Judgment. Petitioner filed its Notice of Appeal on August 9, 1993.

The facts are not in dispute. On November 21, 1990, Petitioner entered into a contract of ocean carriage with Pan Ocean Marine, Inc. for the towage of Petitioner's vessel, YFNB-33 SEACON from Mayport, Florida to the United States Naval facility in Portsmith, Virginia. Subsequently, Petitioner, Pan Ocean Marine, Inc.'s parent corporation, Project Logistics and Transportation, Inc., contracted with Respondent to perform the tow. Petitioner was aware that Respondent's vessel was to tow its vessel. Thus, there was no dispute that Respondent was authorized to provide the necessaries.

Respondent's tug, CYNTHIA TURECAMO, towed the YFNB-33 SEACON from Mayport, Florida to Portsmith, Virginia. Respondent's invoice for services was $55,800. However, Respondent only received $20,800 from Project Logistics and Transportation, Inc. for its towing services. Thus, Respondent is still owed $35,000.

Pursuant to the terms of the *Suits and Admiralty Act* (SIAA), 46 U.S.C. § 741, *et seq.* and the *Maritime and Commercial Instruments and Liens Act* (MCILA), 46 U.S.C. §§ 31301-31343, on September 23, 1992, Respondent filed an *in personam* action against Petitioner. Alleging that, as authorized, it had provided necessaries to Petitioner's vessel, with authorization, Respondent, thereafter, filed a Motion for Summary Judgment. The basis of Respondent's motion was that, as recognized by this Court in *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558 (1992), Respondent had a right to pursue an *in personam* action against the United States by utilizing *in rem* remedies. On June 18, 1993, the lower court granted Respondent's Motion for

Summary Judgment. The Eleventh Circuit Court of Appeals affirmed the decision of the lower court and denied Petitioner's Request for *En Banc* Consideration.

SUMMARY OF THE ARGUMENT

Following precedent established in *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990), the Eleventh Circuit Court of Appeals held that Respondent Turecamo of Savannah, Inc. had a right to bring an *in personam* action, based on *in rem* principles, for towing services that benefited Petitioner. In enacting the *Maritime Commercial Instruments and Liens Act* (MCILA), 46 U.S.C. § 31301, *et seq.*, Congress did not intend to change substantive law which had existed under the *Maritime Liens Act*, 46 U.S.C. § 971. Thus, like the *Suits in Admiralty Act*, 46 U.S.C. § 741, *et seq.*, the *Public Vessels Act* (PVA), 46 U.S.C. § 788 and the *Foreign Sovereign Immunities Act* (FSIA), 28 U.S.C. § 1330, *et seq.*, a private party has a right to bring an *in personam* action, based on *in rem* principles.

The issue presented by Petitioner is not one of constitutional significance. It is not one of broad national application. Moreover, there is only one Circuit Court which has ruled on this limited issue. For these reasons, the issue raised by Petitioner is not of significance for which this Court should grant a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

GIVEN THE FACT THAT THE UNITED STATES CONGRESS, IN ENACTING THE *MARITIME COMMERCIAL INSTRUMENTS AND LIENS ACT* (MCILA), 46 U.S.C. § 31301, *ET SEQ.* DID NOT CHANGE THE SUBSTANTIVE LAW PERMITTING *IN PERSONAM* ACTIONS, BASED ON *IN REM* PRINCIPLES, AGAINST THE UNITED STATES, THE DECISION OF THE ELEVENTH CIRCUIT WAS CORRECT.

Prior to the enactment of the *Maritime Commercial Instruments and Liens Act,* 46 U.S.C. § 31342, a provider of necessaries to a United States vessel had an unquestioned right to pursue an *in personam* action, based on *in rem* principles, against the United States *Stevens Technical Services, Inc. v. United States,* 913 F.2d 1521 (11th Cir. 1990). In that case, brought under the predecessor of the MCILA, *The Federal Maritime Lien Act (MLA),* 46 U.S.C. § 971, Judge John R. Brown, an acknowledged Admiralty judge and former Admiralty practitioner, analyzed very carefully the development of actions against the United States as owner of public vessels. In finding that a subcontractor had a right, under the MLA, to bring an *in personam* action, based on *in rem* principles, Judge Brown analogized the issue to those actions brought under the *Suits in Admiralty Act,* 46 U.S.C.§ 741, *et seq.* and the *Public Vessels Act,* 46 U.S.C. § 788. Both statutes specifically provide that a party may bring an *in personam* action based on *in rem* principles against the United States.

Section 742 of the SIAA provides as follows:

> **Libel in personam**
>
> In cases where if such vessel were privately

> owned or operated, . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . .

Section 743 of the SIAA provides as follows:

> **Procedure in cases of Libel in personam**
>
> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . . If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libel in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. . . .

Moreover, § 781 of the PVA provides as follows:

> **Libel in admiralty against or impleader of United States**
>
> A libel in personam in admiralty may be brought against the United States . . . . for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States . . . .

Seasoned admiralty practitioners understand that, in a strict sense, a party does not have a maritime lien against a public vessel. A lien is a prerequisite to an *in rem* proceeding under Rule C, *Supplemental Rules for Certain Admiralty and Maritime Claims*. Thus, having no maritime lien, the party cannot arrest a public vessel. 46 U.S.C. § 741 (SIAA); 46 U.S.C. § 788 (PVA). Nonetheless, under both statutes, SIAA and PVA, the aggrieved party may bring an *in personam* action in accordance with *in rem* principles. In other words, if the party would have had the *in rem* right against a privately owned vessel, it has *in personam* remedies against the United States.

In *Stevens, id.*, Judge Brown concluded that the "no lien clause" contained in § 788 of the PVA did not prohibit litigants from bringing a libel *in personam* on principles of *in rem* liability as permitted under §§ 742 and 743 (SIAA, 913 F.2d at 1533). The action in *Stevens* was brought for sums due a subcontractor for repairs to the USS SEALIFT ANTARCTIC, a public vessel demise chartered to the United States through the Military Sealift Command, a subdivision of the United States Navy.

Had Stevens Technical Services, Inc., the subcontractor, provided the necessaries to a privately owned vessel, it would have had *in rem* rights against the vessel. 46 U.S.C. § 971. Thus, Stevens could use *in rem* principles in pursuing the *in personam* claim against the United States. Of significance, there is no contrary circuit court opinion on this issue.

Following the direction from *Stevens*, the Eleventh Circuit in *Bonanni Ship Supply, Inc. v. United States.*, 959 F.2d 1558 (11th Cir. 1992), held that a subcontractor could, under the recently enacted MCILA, pursue an *in personam* action in accordance with *in rem* principles. Thus, the Eleventh Circuit construed the MCILA no differently than it had the MLA. Referring to the congressional intent extracted from the Committee Reports

published in the Official Congressional Record, the court noted that § 31342 made no change in the substantive law:

> [t]his Section makes no substantive change to law. This Section does not supersede the prohibition under the Public Vessels Act, the Foreign Sovereign Immunities Act, or the Suits in Admiralty Act, on bringing an *in rem* action against a public vessel.

959 F.2d at 1562. (Quoting from H. Rep. No. 100-918, 7 U.S. Code Cong. and Admin. News 100th Cong. 2nd Sess. 6140, 6141 (1988).)

This statement is consistent with the language of § 31342 of the MCILA. Nowhere in the text of § 31342 is there any suggestion that Congress had altered the longstanding substantive right — to pursue *in personam* actions in accordance with *in rem* principles. Section 31342 simply codified the pre-existing decisional authority which, in accordance with the statutes, had permitted *in personam* actions based on *in rem* principles. Thus, the MCILA is consistent with the SIAA, PVA and the FSIA. These statutes do not permit *in rem* actions but permit *in personam* actions based on *in rem* principles.

When the Eleventh Circuit considered the identical issue in this case, Petitioner United States again asserted that, in enacting the MCILA, Congress had intended to alter the substantive law, *i.e.*, that the MCILA as technically revised in 1989 prohibited an *in personam* action based on *in rem* principles. In advancing this position, Petitioner has relied, in part, on an isolated, ambiguous statement of a United States Congressman. The comment reads as follows:

> Likewise, we have clarified provisions

> relating to maritime liens against public vessels. Although I felt that we had taken [care] of any uncertainty last year, we have rewritten Section 31342 to clarify once and for all the fact that a claim may not be brought either in personal [sic] or in rem on a maritime lien theory against a public vessel.

135 Cong. Rec. 9184 (daily ed. Nov. 20, 1989).

Based on this confusing statement, one cannot ascertain whether Rep. Robert W. Davis understood the pre-existing substantive law applicable under the MLA, SIAA, PVA and FSIA. One factor, however, that does seem self-evident from a review of the Legislative History, Congress did not intend to make substantive changes to the law. To reiterate, the Legislative History reads as follows: "[t]his section makes no substantive change to law." H.R. Rep. No. 918, 100th Cong., 2nd Sess. 7, (1988). Moreover, the statement relied upon by Petitioner on the 1989 technical revision, likewise, indicates that Congress did not intend any substantive changes.

In 1989, Congress made the technical revision to § 31342 by deleting the phrase "except a public vessel" from § 31342(a). Section (a) permitted an *in rem* action against a private vessel by the provider of necessaries. In making the technical revision, Congress then used similar language (prohibiting an *in rem* action against a public vessel) by adding (b) to § 31342. Section (b) reads: "(b) This Section does not apply to a public vessel."

Petitioner has interpreted section (b) to prohibit *in personam* actions against the United States. In addition to reliance on Rep. Davis' comment, Petitioner has referred to correspondence to the House from the United States Department of Justice. Petitioner contends that this department urged Congress to change the

substantive law in the 1989 technical amendment. However, the comments contained in the legislative history do not evince a clear intent to prohibit *in personam* actions, applying *in rem* principles, against the United States. Rather, the passages extracted from the House Reports merely express some intent to prohibit actions against public vessels but not against the United States *in personam*. For example, in correspondence from the United States Department of Justice to the Chairman of the Merchant Marine and Fisheries Committee, in connection with the 1988 bill, counsel stated:

> Section 31342 should be amended to include the italicized phrase:
>
> > A person providing necessaries to a vessel, other than a **public vessel of the United States or a public vessel of a foreign government**, on the order of a person listed in Section 31341 of this title or a person authorized by the owner—
>
> This would ensure that no claim for maritime liens could be asserted against public vessels (naval, coast guard, etc.) for any reason, in accordance with the Public Vessels Act, 46 U.S.C. § 788 and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, et seq. Those contracting with the United States to provide necessaries to its public vessels already have in personam right to sue on the contract.

From this correspondence, one could not conclude that there was an intent to prohibit *in personam* actions, based on *in rem*

principles. Although the statement is ambiguous, the passage would seem to recite the existing substantive law — prohibiting *in rem* actions against public vessels. To reiterate, a lien is a pre-requisite to an *in rem* proceeding. Rule C *For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure.*

In addition to Rep. Davis' statement on the floor of the House, Petitioner has, in part, emphasized a passage extracted from a House Report, 135 Cong. Rec. 9312 (daily ed. Nov. 21, 1989). The Report reads as follows:

> Section 31342 has been rewritten by deleting the parenthetical provisions relating to excluding public vessels from the application of the existing law and replacing it with a new subsection (b) to assure clarity. This is not a substantive change but simply makes more explicit the long established rule of law prohibiting maritime liens against public vessels. It further clarifies the existing law that a claim may not be brought either in personam or in rem on a maritime lien theory against a public vessel. This Section does not affect a cause of action against the United States based on a valid maritime contract.

Like other passages extracted from Legislative History, this statement is ambiguous. Nonetheless, one cannot read into the statement any indication that Congress intended to change substantive law.

Despite efforts by Petitioner to have the Eleventh Circuit consider this case *en banc*, the court declined. Thus, as the court in *Bonnani* had held, the Eleventh Circuit has adhered to precedent that this Court had set in *Canadian Aviator, Ltd. v.*

United States, 324 U.S. 215 (1945). In other words, a private party may utilize *in rem* principles to pursue an *in personam* claim against the United States. Because there was no intent by Congress in enacting the MCILA to alter substantive law, Respondent properly brought this action against the United States.

II.

THE ISSUE IS NOT "AN IMPORTANT QUESTION OF FEDERAL LAW", AND THUS, DOES NOT FALL UNDER THIS COURT'S GUIDELINES FOR ISSUANCE OF A WRIT OF CERTIORARI.

Respondent respectfully submits that this Court should not grant certiorari in the present case. The issue before this Court is not "an important question of federal law." As a consequence, certiorari is not proper under United States Supreme Court Rule 10.1.

Generally, Rule 10.1 guides this Court's discretionary grant of certiorari. Specifically, the rule states that:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision another

> United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.
>
> 2. The same general considerations outlined above will control in respect to a petition for writ of certiorari to review a judgment of the United States Court of Military Appeals.

Sup. Ct. R. 10.1 (1995). In the present case, the issue before this Court turns upon the application and interpretation of the *Maritime Commercial Instruments and Lien Act* (herein MCILA). First, there is not a conflict between federal circuits or between state supreme courts over this issue. In addition, this

issue concerns a very isolated and infrequently-invoked provision of the act governing the ability of a litigant to bring a cause of action against a vessel of the United States. Consequently, because the issue before the Court does not involve broad constitutional concerns, it does not meet the criteria for certiorari enumerated in Rule 10.1(a), (b) or (c).

A. Rule 10.1(a) and (b) Are Not Applicable.

As a preliminary matter, this Court should recognize that the grounds for certiorari outlined in Rule 10.1(a) and (b) do not exist in the present case. With respect to Rule 10.1 (a), there is no conflict between federal circuits regarding the application and interpretation of the MCILA. Although certain district courts have decided the present issue in a conflicting way, no circuit has adopted a position conflicting with the position taken by the Eleventh Circuit upon this issue. (Petitioner's Petition for Writ of Certiorari, p. 20). *See also, Turecamo of Savannah, Inc. v. United States*, 36 F.3d 1083 (1994). Second, the grounds for certiorari outlined in Rule 10.1(b) also are not applicable. There is no state supreme court decision that is in direct conflict with a federal circuit or other state Supreme Court decision concerning the application and interpretation of the MCILA. (Petitioner's Petition for Writ of Certiorari, p. 20). Consequently, the grounds for certiorari outlined in Rules 10.1(a) and (b) do not exist.

B. Rule 10.1(c) — Important Federal Question

The only alternative ground for certiorari provided for by Rule 10.1 is found at Rule 10.1(c). In particular, certiorari is proper under Rule 10.1(c) when:

> . . . a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be,

> settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.1(c) (1995).

According to past decisions of this Court interpreting the language "an important federal question," this ground for certiorari also does not exist in the present case.

The decisions of this Court examining for the existence of "an important federal question," clearly indicate that the issue at bar is not "an important federal question" warranting certiorari. Generally, this Court has reserved its certiorari jurisdiction to important constitutional questions having a national or potentially national impact. *See generally*, 13 Jeremy C. Moore, *et al.*, Moore's Federal Practice ¶ 810.41 (2d ed. 1995) stating:

> If a case raises a genuine and substantial question of constitutional law that has matured, and that question has not yet been considered by the Court, then that case is a candidate for review. . . . Increasingly, the Court has shaped its caseload toward constitutional and related issues).

For instance, in *Miranda v. Arizona*, 384 U.S. 436, 441-442, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), this Court granted certiorari to a criminal defendant who raised constitutional self-incrimination issues under the Fifth Amendment. Further, in *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960), this Court granted certiorari to a criminal defendant who raised due process considerations pertaining to his conviction of loitering and disorderly conduct. In addition, in *In re Murchison*,

349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955), this Court granted certiorari to determine whether the Due Process Clause prevented a judge from presiding in a criminal contempt case when he had previously served as the one-man grand jury in the proceeding in which the charge arose. Further, in *Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961), this Court granted certiorari to determine whether the laws of the State of Oregon or provisions from a treaty between the United States and Yugoslavia should apply to a dispute over land. *See also, Saxbe v. Washington Post Co.*, 417 U.S. 843, 846, 94 S. Ct. 2811, 41 L. Ed. 2d 514 (1974) (certiorari granted to review constitutionality of regulation that prohibited newsmen from interviewing federal prison inmates in non-minimum security prisons); *Gannet Co. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 62 L. Ed. 2nd 608 (1979) (certiorari granted to review constitutionally under First and Sixth Amendments of order banning press from a pre-trial suppression hearing); *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 383, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974) (certiorari granted to review a judgment of the D.C. Circuit that set aside an administrative order on the ground that the order amounted to a deregulation of small producers of natural gas and was unauthorized by the Natural Gas Act); *Federal Open Market Comm'n of the Fed. Reserve System v. Merrill*, 443 U.S. 340, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (1979) stating:

> The Federal Open Market Committee has a practice, authorized by regulation, . . . of withholding certain monetary policy directives from the public during the month they are in effect . . . the United States Court of Appeals for the District of Columbia Circuit held that this practice violates the Freedom of Information Act. . . . We granted Certiorari on the strength of the Committee's

> representations that this ruling could seriously interfere with the implementation of national monetary policy").

From the illustrative holdings of this Court cited above, it is clear that certiorari is not proper in the present case. First, the issue before this Court does not involve broad constitutional issues which have a national impact. In particular, the issue before this Court deals principally with a singular provision of the MCILA which governs suits brought against United States vessels. Second, the issue before this Court does not involve matters pertaining to the civil and property rights of individuals. In *Miranda, Thompson* and *In re Murchison,* the issues involved concerned important civil rights of criminal defendants relevant to the national jurisprudence of criminal law. While the issue in the present case may be important in a given context, it does not possess the overriding and blanket importance of the rights of criminal defendants. Finally, as previously discussed, the Eleventh Circuit has held that the issue brought before this Court by the Petitioner simply is not "an issue." In its opinion below, the Eleventh Circuit indicated that the law in this area is relatively well-settled. *Turecamo,* 36 F.3d 1083, 1087 (1994). In particular, the circuit noted that Congress "has expressly stated its intent" with regard to the statute and that "it is inappropriate to second-guess Congress' view of existing law." *Id.* Thus, based upon these considerations, it is apparent that the issue currently under consideration is not "an important issue of federal law" for purposes of Rule 10.1. Consequently, certiorari is not proper in the present case.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that this Court should deny Petitioner's Petition for Writ of Certiorari.

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